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No. 246

In the Supreme Court of the United States

OCTOBER TERM, 1958

WADELMIRO ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 267–272) is reported at 256 F. 2d 549.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1958 (R. 273). On July 24, 1958, the time to file a petition for a writ of certiorari was extended by Mr. Justice Frankfurter until August 4, 1958 (R. 275). The petition for a writ of certiorari was filed August 1, 1958, and was granted on October 13, 1958 (R. 277). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 302 of the Labor Management Relations Act of 1947 makes it unlawful for any employees' representative "to receive or accept, * * * from the employer of such employees any money * * *." This prohibition, however, is not applicable "(5) with respect to money * * * paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer * * *." The following questions are presented:

1. Whether an employees' representative violates this section by receiving from employers money which, although given for a union welfare fund, was actually accepted and used by the representative for personal purposes.

2. Whether the evidence supports the jury's verdict that petitioner violated this section by accepting from employers, for personal purposes, money which he deposited in a union welfare fund over which he had complete control.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or ac-

cept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their

families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such writ-

ten agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both * * *.

* * * * *

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for Puerto Rico under an indictment charging that, in violation of Section 302 (b) and (d) of the Labor Management Relations Act of 1947, he had unlawfully received $15,000 from employers (R. 2, 3–5). He was sentenced to imprisonment for nine months and to pay a fine of $2,000 (R. 2). The Court of Appeals for the First Circuit unanimously affirmed the conviction.

1. The evidence for the government may be summarized as follows:

On February 21, 1953, two allied sugar corporations in Puerto Rico engaged in interstate commerce, Central Mercedita Inc. and Puerto Rican American Refinery, Inc., entered into a collective bargaining agreement with a union (Local 1781, Union de Trabajadores de Factoria, Refineria y Ramas Anexas), of

which petitioner was president (R. 42–44). Article 6 of the agreement provided that the two employers together would pay $15,000 to an employee welfare fund to be administered by a committee appointed by mutual agreement between the employers and the union (R. 26). The fund was to be used "to furnish and provide the workers of the Employer * * * with means of hospitalization * * * and other medical aid in case of non-occupational illnesses or accidents" (*ibid.*). The committee was to furnish the employers with a monthly statement of disbursements (*ibid.*).

In a 1952 labor contract between the same parties, a similar welfare fund had been established in the Banco de Ponce and distributed by a committee composed of petitioner for the union and a Dr. Clavell for the employers (R. 52). Checks drawn against the fund were signed by both representatives (*ibid.*). At the time the 1953 agreement was executed, the parties informally agreed that petitioner would continue to be the union representative on the committee, and that the employers' representative would be Mr. Pedro G. Goyco (R. 42, 51, 105–106).

The money for the 1952 welfare fund had been deposited by a representative of the employers (R. 60). However, after the 1953 contract was signed, petitioner told the employers' representative, Mr. Goyco, that there was to be a meeting of the workers that evening, and that he wanted to show them the checks for the welfare fund (R. 46). Each company gave petitioner a check for $7500, payable to the union (R. 27, 29, 172; see R. 147). Attached vouchers identified the checks as the employers' contributions to the welfare

fund (R. 28, 30–31). Petitioner endorsed the checks for the union as its president and also had them endorsed by its secretary, Mr. Luis Silvagnoli (R. 27, 29, 45, 114). Instead of depositing the checks in the then-existing welfare fund bank account, however, petitioner, without consulting the employer representative, on February 24, 1953, opened an account in the name of the union's welfare fund in another bank, the National City Bank of Ponce, Puerto Rico (R. 56, 67, 77). A few days later, he gave the bank a purported resolution from the unions' board of directors authorizing withdrawals from the account upon his signature alone (R. 56, 67–68, 73, 77, 113).[1]

As soon as the employers learned that the checks had been deposited in a new bank account and not in the previous welfare account, they attempted to secure performance of the agreement for joint administration of the fund (R. 51–52). Petitioner, however, consistently refused—over a period of several months—to comply with the agreement or to account for the money (R. 51–53, 110).

[1] The meeting at which the resolution allegedly was passed never took place (R. 115). Besides petitioner's signature, the only signature appearing on the resolution when it was introduced in evidence purported to be that of Luis Silvagnoli, the union secretary, but Silvagnoli's "signature" was shown to be a forgery (R. 114–115). Mr. Juan Rivera, a member of the union's board of directors, appeared as a witness for the defense and testified that he and others had signed the resolution originally (R. 163, 165–166), thus suggesting that a portion of the resolution had been cut off (see R. 116–117). However, he conceded that the name "Luis Silvagnoli" appearing on the exhibit did not resemble the secretary's signature (R. 167). There was no testimony concerning the circumstances under which the resolution was mutilated.

On March 16, 1953, approximately three weeks after the opening of the new account, petitioner began to draw personal checks on it. He transferred $1,300 to his personal checking account (R. 74, 76), and drew upon the welfare fund account to make the down payment on a new automobile (R. 76, 95–96). Ten days later (March 26, 1953), following the employers' complaint that petitioner was not complying with the agreement for joint administration of the fund, petitioner withdrew the balance of the fund ($9,813.89) by a manager's check (R. 68–69). The same day, he deposited the balance in a new account which he opened in the union's name in the Banco de Ponce (R. 79–80). Petitioner had sole authority to draw on this fund, and the name of the account made no reference to welfare fund purposes (R. 79–81).[2] Petitioner continued to use this account for personal purposes, and also used it for some non-welfare union purposes. He paid off a personal debt for household furnishings (R. 83, 86–88) and purchased office furniture and equipment (R. 83, 91, 97–98), at a time when the welfare funds were the only moneys on deposit in the account (R. 98).

2. At the conclusion of the government's case, petitioner moved for a judgment of acquittal on the ground that Section 302 does not cover embezzlement

[2] Checks drawn on union funds were supposed to be countersigned by Mr. Silvagnoli, the secretary (R. 123), but petitioner expelled Silvagnoli from the union on April 22, 1953, even though Silvagnoli had been elected by the rank and file (R. 120–121). Four days later, petitioner called a meeting of the union members and demanded the right to draw checks against union funds solely on his own signature (R. 123).

of union welfare funds, and that was all that the evidence showed (R. 125–131). After lengthy argument (R. 125–159), during which the government pointed out (R. 141–142) that the theory of the case was not embezzlement, but that petitioner intended to appropriate the checks to his own use from the outset, the trial court denied the motion (R. 159).[3] The court, after summarizing the government's evidence (R. 146–148), concluded (R. 148–149) that

> * * * this evidence is sufficient to permit the jury to find that the defendant actually received from the employer the moneys he drew from this account for his own personal purposes, and that these funds were not received by the defendant, nor did he intend to receive them in pursuance of the creation of the welfare fund * * *.

The court expressed a similar view when, in again denying a motion for acquittal at the conclusion of the case (R. 177, 192), it stated (R. 191, 190):

> [R]ight from the beginning before the conversation the defendant had the intention of getting full control of that money * * * under the evidence the union never had control of the fund.

Along these same lines, the court instructed the jury as follows (R. 235–237):

> As I see the statute, the purpose for which the money or anything of value is delivered and received must be a mutual purpose. *If the*

[3] The court stated (R. 137) that "[o]nce the fund was lawfully established and deposited in the care of the union," subsequent embezzlement therefrom would not violate Section 302.

employer, in delivering money delivers it for the exclusive purpose of creating a fund, and that it be complying with the requirements of this section, *the representative receiving that money must have the same objective in mind. Now, if his objective is different, and if he gets hold of the money and does not comply with the provisions of this section as to the fund,* the welfare fund, *as required by the employer in the entry on the vouchers, then he cannot claim that what the employer said must guide you.*

You must be guided simply by what happened. What was the actual situation? *What were the circumstances under which this money came into the possession of the defendant?* What the employer might have intended does not count, unless that purpose is accomplished. * * *

* * * * *

I further charge you that if you believe from all the evidence beyond a reasonable doubt that the defendant Wadelmiro Arroyo obtained or received from the employers Central Mercedita, Inc., and Puerto Rican American Refinery, Inc., the sum of $15,000, and that by law, which is the sole and exclusive benefit of the employees of the employer and their families and dependents for the purposes of paying for medical and hospital care, pensions, on retirement or death of employees, but rather if you believe that from the time the defendant received said sum of money from the employers he had complete and sole control of said money, in violation of the collective bargaining agreement and the law, and utilized such money or

any part of it for his personal benefit, then I charge you that the defendant has violated the above mentioned section of the law * * *. [Emphasis added.]

3. In unanimously upholding petitioner's conviction, the Court of Appeals stated (R. 271) that the question is whether petitioner "'received' the checks on behalf of the Union for its welfare fund to be administered according to the terms of the collective bargaining agreement, or whether he accepted the checks for a bogus welfare fund, i.e., one over which he in fact had complete and sole control in violation of the collective bargaining agreement, for in that event he did not 'receive' them under any of the circumstances permitted by subsection (c) of § 302 of the statute"; and it ruled (*ibid.*) that the conviction was supported by the evidence of petitioner's "conduct in obtaining sole personal control over the fund and then in withdrawing from it for his own personal expenses soon after he deposited the checks in the Ponce branch of the National City Bank."

SUMMARY OF ARGUMENT

Section 302 of the Labor Management Relations Act of 1947 prohibits a representative of employees from receiving or accepting from their employer "any money" or other thing of value; however, this broad prohibition is inapplicable, *inter alia*, "with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families or dependents." Petitioner was tried and convicted of violating this section on the

theory that, although he accepted $15,000 from the employers purportedly for a union welfare fund, in fact he accepted the money for his personal use.

I

A. Contrary to petitioner's contention, the "broad prohibition" (*United States* v. *Ryan*, 350 U.S. 299, 305) in Section 302 is not limited to money or things of value which a representative obtains through bribery or extortion. Neither the language of the provisions, nor their legislative history, indicates that the section is thus restricted.

B. An employees' representative violates Section 302 by accepting money from an employer with the intent of using it personally, even though the money ostensibly is accepted and deposited in a union welfare fund. The acceptance of money by a representative in such circumstances does not come within the exception of Section 302 because there is no bona fide "trust * * * for the * * * benefit of employees."

1. The legislative history of Section 302 shows that Congress intended to prohibit a representative from receiving from employers anything of value, ostensibly for a proper welfare fund but actually with the intent of using it for a purpose not covered by the five specific exceptions in Section 302. In proposing Section 302, the sponsoring Senator stated (93 Cong. Rec. 4678) that "[u]nless we make sure that such [welfare] funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, there is

very grave danger that the funds will be used for the personal gain of union leaders * * *."

2. The fact, upon which petitioner relies, that the $15,000 was paid by the employers with the intent of creating a welfare fund, and was deposited by petitioner in the bank in the name of such fund, does not exculpate him. Such reliance on the form, rather than the substance, of the transaction could well lead to evasion of the statute. The Act clearly prohibits a representative from receiving from an employer a direct payment which is not covered by one of the exceptions. However, the same proscribed result could be achieved indirectly if the representative ostensibly could treat the money as a welfare fund, and yet use it for personal purposes. A sham would prevail.

The prohibitions of Section 302 are not limited to those acts "possessing the element of mutuality", *i.e.*, it is not necessary for a violation that both the representative and the employer must be guilty. The Act contains separate prohibitions against improper payments by employers, and improper receipts by representatives, and violation of one provision is not a prerequisite to violation of the others. Congress, in enacting Section 302, thus applied a settled principle in criminal law that the grantor of property may have a different intent than the grantee, and that one may be guilty even though the other is not.

3. Contrary to petitioner's contention, the case was not tried or presented to the jury, and his conviction does not rest, upon any theory of embezzlement.

The theory of the prosecution was not that petitioner misappropriated property which lawfully came into his possession, but that his initial possession of the property was tainted because from the outset he intended to convert it. Petitioner, therefore, was tried and convicted not for embezzlement but for conduct amounting to larceny by trick. The distinction between these two crimes is well settled. Where property is entrusted for a special purpose but the recipient takes it with intent to use it for his own purposes, he is guilty of larceny and not embezzlement; and where he obtains the property by fraud or trick, the offense is the form of larceny known as larceny by trick.

II

The jury was charged that, to convict, it had to find that petitioner had a different purpose in accepting the $15,000 than the employer's purpose in turning it over to him, that of creating a proper welfare fund. The evidence supports the jury's verdict that petitioner received the money with the intent, from the beginning, of using it for his personal purposes and not for a proper welfare fund.

Petitioner's official position as president of the union enabled him to obtain the checks by purporting to accept them for the employees' welfare fund. The welfare fund was established as one of the results of a collective bargaining agreement and it was identical in amount and purpose to the fund created by a prior contract between the same parties. The prior fund had been disbursed jointly by petitioner and a member of management, and it was expressly agreed that the

new fund would also be subject to joint control. Since petitioner was to continue as the union member in the administration of the fund, it is not strange that the employers delivered the checks to petitioner when he said that he wanted to show them to the union members.

The jury was warranted in concluding that petitioner never accepted the money for the purpose for which it was given. Instead of depositing the checks in the former welfare fund account, petitioner established a new account in a different bank—an account over which the employer representative had no control. He used a spurious union resolution to authorize his drawing on the account on his own signature alone. He spent large sums from the fund on personal enrichment. After transferring the balance of the fund to a general union account, he expelled from the union the secretary whose counter-signature was normally necessary on union checks. He continued to divert the fund to personal uses. He eventually commingled the residue of the welfare money with general union funds.

ARGUMENT

Section 302 of the Labor Management Relations Act of 1947 prohibits a representative of employees from receiving or accepting from their employer "any money" or other thing of value. However, this broad prohibition is inapplicable, *inter alia*, "(5) with respect to money or other thing of value paid to a trust fund established [for certain specified welfare purposes] by such representative, for the sole and exclusive benefit of the employees of such employer, and

their families and dependents." *Supra*, p. 3. Petitioner was tried and convicted of violating this section on the theory that, although he accepted $15,000 from the employers purportedly for a union welfare fund, in fact he accepted the money for his personal use.

Petitioner contends that such conduct does not violate Section 302. He argues (Br. 11) that the section is directed only at "bribery and extortion," and does not cover "personal profiteering from or maladministration" of union funds; and that since the $15,000 "was paid by the employer and deposited by the Union in the name of a welfare fund (a payment exempted from § 302), no violation was made out" (Br. 6, footnote omitted), without regard to whether the deposit in the name of the union was but a mere sham, designed to enable the representative to use the money for personal and other non-welfare fund purposes.

We shall show, however, that Section 302 is not limited to prohibiting acceptance of money obtained by an employees' representative through bribery and extortion; that it also covers receipt of money which, although intended by the employer for, and ostensibly deposited by the representative in, a union welfare fund, is in fact accepted by the representative with the intent of using it for personal rather than union welfare purposes; and that the evidence justified the jury in concluding that from the beginning petitioner accepted the $15,000 with the intent of using it personally.

I. SECTION 302 PROHIBITS A REPRESENTATIVE OF EMPLOYEES FROM ACCEPTING FROM THEIR EMPLOYER, WITH INTENT TO USE IT PERSONALLY, MONEY WHICH HE PURPORTEDLY ACCEPTS AND DEPOSITS AS A UNION WELFARE FUND

A. *The Prohibitions in Section 302 Against a Representative Accepting Money From an Employer Are Not Limited to Money Obtained Through Bribery and Extortion*

Section 302 contains "a broad prohibition" (*United States* v. *Ryan*, 350 U.S. 299, 305) against "any representative" of employees receiving or accepting from their employer "any money or other thing of value," unless it comes within "five specific exceptions" (*ibid.*). Neither the prohibition, nor any of the exceptions, limits the ban to money or things of value which are obtained by bribery or extortion.

Nor does the legislative history of this provision establish that Congress intended thus to limit the reach of Section 302. While that history shows that Congress was concerned with bribery and extortion involving employee representatives, "Congress [also] was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit." *United States* v. *Ryan, supra*, at 304. To deal with this situation, Section 302 "outlaws all payments, with stated exceptions, between employer and representative." The legislative history, discussed *infra*, pp. 18–24, clearly does not sustain petitioner's contention that the only "payments * * * between employer and

representative" (*Ryan* case, *supra*, p. 305) which Congress prohibited were those which grew out of bribery or extortion.

B. *An Employees' Representative Violates Section 302 by Accepting Money From an Employer With the Intent of Using it Personally, Even Though the Money Ostensibly is Accepted and Deposited in a Union Welfare Fund*

The basic theory on which this case was tried and submitted to the jury, and upon which petitioner was convicted, was that, although he purportedly accepted the $15,000 for a union welfare fund, he in fact accepted the money with the intent of using it for his own purposes. In other words, petitioner's receipt of the $15,000 did not come within the exception of Section 302(c)(5) because there was in this instance no bona fide "trust * * * for the * * * benefit of the employees * * *" (*supra*, p. 3); it therefore fell within the ban of the general prohibition in Section 302(b). While the employers may have intended that the money was to go into such a fund, petitioner had a different purpose in accepting it, namely, to use it personally. We submit that petitioner's acceptance of the money in such circumstances is prohibited by Section 302.

1. The legislative history of Section 302, from its original language in the Case Bill (H.R. 4908, 79th Cong., 2d Sess.) to its final version in the Taft-Hartley Act, affirmatively shows a general Congressional intent to protect the integrity of the collective bargaining process by prohibiting financial payments by employers to unions or union representatives, and to regulate union welfare funds so as to prevent their

diversion from health, hospital, medical, and retirement purposes. It shows that Congress sought to prohibit any representative from receiving from employers anything of value, ostensibly for a proper welfare fund but actually with the intent to use it either personally or for a purpose not covered by one of the five specific exceptions in Section 302(c), and without regard to the purpose with which the employer paid the money.

Section 302 had its origin in an amendment to the Case Bill which Senator Byrd proposed from the floor in the 79th Congress. It was the purpose of the Case Bill, as recited in its preamble, "to encourage settlement of disputes between labor and management by collective bargaining and by conciliation, mediation and voluntary arbitration, thereby minimizing industrial strife, strikes and lock-outs."[4] When the Case Bill came before the Senate, Senator Byrd moved to insert an amendment forbidding any payment by an employer, or any receipt by a representative, unless the payment was for services as an employee, or was for union dues withheld by the employer under a "check-off" agreement. 92 Cong. Rec. 4809. Senator Byrd explained briefly that the purpose of his amendment was to insure that funds would not be paid by an employer or received by a representative if the representative was to have exclusive control over the fund. 92 Cong. Rec. 4892–4895. He had in mind that, if payments for other than specified proper purposes were not outlawed, and

[4] H.R. 4908, 79th Cong., 2d Sess., as passed by Congress on May 31, 1946 (92 Cong. Rec. 5957, 6071).

some sort of control provided for the permitted funds, the payment might be made to bribe the representative (92 Cong. Rec. 4893) or the fund might be used by the representative to finance political activity rather than welfare benefits (92 Cong. Rec. 4894).

Despite Senator Byrd's protest that his amendment would not prevent an employer from establishing a welfare fund through collective bargaining, or from making contributions to ordinary employee functions, such as a baseball team, some Senators objected that the amendment as drawn was so broad as to forbid innocuous employer contributions. 92 Cong. Rec. 4896. To meet this objection, Senator Knowland offered modified language forbidding payments which would be under exclusive union control. He stated (92 Cong. Rec. 4899):

> * * * [T]he proposed language would not prevent the establishment of a health or welfare fund where, under trusteeship or otherwise, it would be for the benefit of the miners, but the fund could not be used for political or other purposes.

Here Senator Knowland envisioned the case where funds are given for a proper purpose but accepted for an improper one—accepted with the secret intent to use the money for political purposes. Senator Byrd recognized the desirability of specifically permitting welfare funds while forbidding their diversion, for he subsequently offered a modified version of his amendment containing a requirement of dual control over welfare funds by employers and employees. 92 Cong. Rec. 5040.

The Byrd amendment remained the pending business before the Senate for the next few days, during which its merits and disadvantages were extensively discussed. 92 Cong. Rec. 5041–5044, 5056–5065, 5073–5100, 5248–5276. Then, Senators Ball and Taft offered a modification of the language of the amendment which was accepted by Senator Byrd and which now appears, with minor changes, as subsection (c)(5) of Section 302, dealing with welfare funds. 92 Cong. Rec. 5277. Later, in discussing the modified Byrd amendment on the floor of the Senate, Senator Ball explained its intent. He said (92 Cong. Rec. 5345–5346):

> Mr. President, in the past Mr. Lewis has seen fit to spend the funds of the United Mine Workers for various educational purposes, including the organizational activities of the CIO and of District 50, which is out organizing all kinds of employees from railroad employees to farmers and dairy workers and everything else. Maybe that is what he means by "educational aid to miners and their families" [an allusion to one of Mr. Lewis's stated purposes for raising a welfare fund].
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> * * * [T]he Byrd amendment is the least we can do in the United States Senate to protect the individual employees from being the victims of union bosses who will demand these funds without any strings attached to them, to be paid over to the unions, and will then use them to perpetrate their power over the employees. If these funds are to be established, they should at least be protected in their estab-

lishment and in their administration *so that they will actually be spent for the purposes for which they are supposedly established.* [Emphasis added.] [5]

The Byrd amendment was adopted by the Senate (92 Cong. Rec. 5521–5522) and the Case Bill passed. 92 Cong. Rec. 5739. The House accepted the Senate amendments (92 Cong. Rec. 5946) but the President vetoed the bill (92 Cong. Rec. 6674–6678) and it failed to pass over his veto. 92 Cong. Rec. 6678.

The 80th Congress also undertook to revise the Wagner Act. H.R. 3020, introduced by Congressman Hartley, passed the House with a provision (Section 8(a)) which treated payments by an employer to a representative as an unfair labor practice. 93 Cong. Rec. 3671, House Rep. No. 245 (80th Cong., 1st Sess., p. 29).

The Senate Committee on Labor and Public Welfare, to which H.R. 3020 was referred, reported out an original bill, S. 1126, to accomplish the same object as H.R. 3020. 93 Cong. Rec. 3613. Section 8 of this bill was a restatement of Section 8(2) of the Wagner Act, merely providing that it was an unfair labor practice for an employer to dominate, interfere with, or contribute financially to a labor organization. S. Rep. No. 105 (80th Cong., 1st Sess., pp. 12, 31, 34).

[5] Senator Taft held to identical tenets: "* * * I assert that once we permit an agent to obtain money for his own use, or for any purpose, it is affirmatively a dubious practice, an immoral practice, and unless it is used for purposes which are properly defined, it should not be permitted." 92 Cong. Rec. 5466. Later, he said (92 Cong. Rec. 5494): "[I]t [the Byrd amendment] prohibits other kinds of funds where wide-open discretion is given to the union to spend in any direction it may see fit to select."

A minority of the Committee, including Senators Taft, Ball, Donnell, Jenner, and Smith, filed their "Supplemental Views" on this bill in which they stated that the failure of the Committee bill to cover employer payments to union trust funds left a definite evil uncovered. They declared their intention to introduce amendments from the floor of the Senate; one of these was to be almost identical to the Byrd amendment as it had passed the Senate in the previous Congress. S. Rep. No. 105, *supra*, pp. 50, 52–53, 56. As promised, Senator Ball introduced [6] Section 302 as an amendment to S. 1126 when the bill was taken up for debate (93 Cong. Rec. 4677), saying (93 Cong. Rec. 4678):

> [U]nless we make sure that such [welfare] funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, *there is very grave danger that the funds will be used for the personal gain of union leaders,* or for political purposes, or other purposes not contemplated when they are established, * * *. [Emphasis added.]

The amendment was adopted by the Senate (93 Cong. Rec. 4754), won acceptance by the conference committee (House Rep. No. 510, 80th Cong., 1st Sess., pp. 24, 25, 67),[7] and was enacted as part of the Labor Management Relations Act.

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[6] The amendment was offered on behalf of Senators Byrd, George, and Smith, as well.

[7] Senators Taft and Ball were two of the four Senate members on the conference committee, p. 29.

From the Byrd amendment in the 79th Congress to the final version of Section 302 in the 80th Congress, there runs the consistent aim to reach improper payments to employee representatives. The Congressional leaders in the effort to enact Section 302 demonstrated, not once but many times, an intent to reach the kind of conduct shown by this record. They had in mind, and intended to outlaw, the case where a contribution is made to a proper welfare fund by an employer, but is received by the representative with the secret intent to use the proceeds for other and improper purposes. Indeed, the broad purpose of the Byrd amendment in the 79th Congress was to prohibit any receipt of funds which the representative intended to use for purposes other than that "for which they are supposedly established" (see *supra*, p. 22); *a fortiori*, Section 302 bans receipt of funds which the representative receives with the intent, from the beginning, of using them for his personal profit.

2. Petitioner contends (Br. 6), however, that since the money was paid by the employer with the intent of creating a welfare fund, and was deposited by petitioner in the bank in the name of such a fund, there was no violation of the statute. But under such a restrictive interpretation of the Act, which looks to the form rather than the substance of the transaction, the prohibitions in Section 302 "may be easily evaded" (*United States* v. *Ryan*, 350 U.S. 299, 305). Receipt by a representative of a direct payment from an employer, not covered by the exceptions in Section 302(c), is illegal. This prohibition could be circum-

vented, however, by designating the money as a union welfare fund and depositing it as such, even though the representative intended to, and did, treat it as his own property. The test of illegality under the Act, therefore, must be whether the representative in fact accepted the money in a good faith attempt to create a proper welfare fund, and not whether he went through the motions of doing so for ulterior purposes.

Petitioner also argues (Br. 11, note 8) that Section 302 condemns only those Acts "possessing the element of mutuality," *i.e.*, he urges that both employer and representative must violate the Act for either to be guilty.

As the Court of Appeals correctly pointed out (R. 271), "the statute does not require mutuality of guilt for the conviction of either the employer or the representative of employees. An employer would be guilty under subsection (a) if he paid or delivered any money or other thing of value to a representative of employees even though the latter repudiated the gift by returning the money or thing tendered. Likewise a representative of employees would be guilty under subsection (b) if he received money or other thing of value from an employer unless the receipt were covered in the exceptions stated in subsection (c)." The prohibition against payments by employers in subsection (a), and against receipts by representatives in subsection (b), constitute separate statutory offenses; violation of one section is not a prerequisite to violation of the other. The legislative history shows that one of the evils which Congress intended to correct was the practice

by some unions and their officials of using welfare funds for purposes other than those for which the fund was created (see *supra*, pp. 20–23)—a situation where only the representative, and not the employer, would be guilty of improper conduct.

Congress in enacting Section 302 thus applied a settled principle in criminal law that the grantor of property may have a different intent than the grantee, and that one may be guilty even though the other is not. Even in the case of payments solicited or made to influence official action, it has been recognized that there need not be any mutuality of guilt.

Thus, in *United States* v. *Waldin*, 149 F. Supp. 912, 913 (E.D. Pa.), affirmed, 253 F. 2d 551, 554 (C.A. 3), certiorari denied, 356 U.S. 973, the defendant, a deputy collector of internal revenue, solicited a payment of $20,000 from a taxpayer whose account was being examined, on the representation that he could forestall a supposedly pending prosecution of the taxpayer. The taxpayer secretly revealed the solicitation to the F.B.I. and then handed over the $20,000 to the deputy collector while agents hid nearby.[8]

The same rule is applied in cases where a trap is set to catch the giver or solicitor of a bribe. See *United States* v. *Louie Gim Hall*, 245 F. 2d 338, 339 (C.A. 2) (defendant paid $150 to an investigator of the Immigration and Naturalization Service to obtain the admission of two immigrants; several F.B.I. agents were

[8] The facts are set forth in the opinions of the lower courts, and in the Government's Brief in Opposition, No. 930, Oct. Term 1957.

watching) (the conviction was reversed by the Second Circuit on other grounds); *Lunsford* v. *United States*, 200 F. 2d 237, 239 (C.A. 10) (defendant paid $100 to a deputy collector of internal revenue for a statement that no additional tax was due; the collector had secretly notified his superior in advance); *Schneider* v. *United States*, 192 F. 2d 498, 499–500 (C.A. 9), certiorari denied, 343 U.S. 914 (defendant paid $1,500 to an Air Force lieutenant who was a salvage officer for permitting defendant to take scrap material other than that purchased by defendant on bid from the air base; the officer had notified the F.B.I. before taking the money); *Patton* v. *United States*, 42 F. 2d 68, 69 (C.A. 8) (defendants paid $500 every two weeks to prohibition agent for protection; as against a claim of entrapment, the court said, "all the officers did, if anything, was to give an opportunity to plaintiffs in error to carry out their scheme of bribery"); *Buckley* v. *United States*, 33 F. 2d 713, 716 (C.A. 6) (defendant, the state treasurer of Ohio, offered a bribe to a prohibition enforcement officer for advance information on raids and brewery inspections; the federal officer notified his superiors while pretending to acquiesce); *Scriber* v. *United States*, 4 F. 2d 97, 98 (C.A. 6) (defendant, a customs inspector, accepted money from persons who, unknown to him, were prohibition agents, to permit the importation of alcoholic beverages from Canada).

3. Contrary to petitioner's contention (Br. 12), the case was not tried or presented to the jury, and his conviction does not rest, upon any theory of embezzlement. The theory of the prosecution was not that

petitioner misappropriated property which lawfully came into his possession, but that his initial possession of the property was tainted because, as the trial court stated in denying petitioner's motion for acquittal, "right from the beginning * * * the defendant had the intention of getting full control of that money" (R. 191). Similarly, the trial court sent the case to the jury under instructions that it could convict only if it found that petitioner, in accepting the money, did not intend to create a bona fide union welfare fund (see *supra*, pp. 10–11). The jury was not charged that it could convict merely upon concluding that petitioner had misappropriated money from an existing welfare fund.

Petitioner, therefore, was tried and convicted, not for embezzlement, but for conduct amounting to larceny by trick. There is a well recognized, deeply rooted, distinction between the two crimes. The general rule was stated by this Court in *Moore* v. *United States*, 160 U.S. 268, 269–270, as follows:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Where possession is lawfully obtained by a defendant who *subsequently* converts the property to his own use, the crime is embezzlement; but where, at the very time of obtaining possession, the defendant intends to

convert the property, the crime is larceny, even though the owner, as the result of a scheme or trick, voluntarily parts with possession. This Court recognized the distinction in *Skinner* v. *Oklahoma,* 316 U.S. 535, 539, in pointing out the inequity of an Oklahoma sterilization statute which applied to persons convicted of thefts but not of embezzlements. It said, 316 U.S. at p. 539:

> There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it." *Bivens* v. *State,* 6 Okla. Cr. 521, 529, 120 P. 1033, 1036. If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. *Bivens* v. *State, supra; Flohr* v. *Territory,* 14 Okla. 477, 78 P. 565. Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose—a question for the jury under appropriate instructions. * * *

See also *Grin* v. *Shine,* 187 U.S. 181, 196; *Tredwell* v. *United States,* 266 Fed. 350, 352–353 (C.A. 4), certiorari denied, 253 U.S. 496.

Although there must be a taking against the will of the owner, or a trespass to his possession to show larceny, the requirement is established where possession is given up because of trickery. In such a case there is no real consent and the taking of possession is wrongful. *Ackerson* v. *United States,* 185 F. 2d 485,

489 (C.A. 8); *Stewart* v. *United States,* 151 F. 2d 386, 388 (C.A. 8); *People* v. *Edwards,* 72 Cal. App. 102, 236 Pac. 944, 948.

In line with this reasoning, it has been held that, where property is entrusted to a defendant for a special purpose and he takes it with the intent then and there to use it, not for the purpose for which it was intended, but for his own use, his crime is larceny and not embezzlement. *Means* v. *United States,* 65 F. 2d 206, 207 (C.A.D.C.); *Tredwell* v. *United States, supra; People* v. *Otterman,* 154 Cal. App. 2d 193, 316 P. 2d 85, 91; *People* v. *Bartges,* 126 Cal. App. 2d 763, 770, 273 P. 2d 49, 52–53; see *Graham* v. *United States,* 187 F. 2d 87, 88–89 (C.A.D.C.), certiorari denied, 341 U.S. 920; *Beck* v. *United States,* 66 F. 2d 203, 204 (C.A.D.C.); *People* v. *McCabe,* 60 Cal. App. 2d 492, 496, 141 P. 2d 54, 57; Annotation, *Distinction Between Larceny and Embezzlement,* 146 A.L.R. 532.

In *Means* v. *United States, supra,* for example, the defendant persuaded Mrs. McLean to give him $100,000 on the false representation that the money would be used to ransom the Lindbergh baby. As a matter of fact, the defendant, at the time he received the money, secretly intended to, and later did, convert the money to his own use. The Court of Appeals answered the defendant's contention that he had committed embezzlement, if anything, by saying (65 F. 2d at 207):

> [O]ne who obtains money from another upon the representation that he will perform certain service therewith for the latter, intending at the time to convert the money, and actually con-

verting it, to his own use, is guilty of larceny * * * [citing authorities].

Petitioner's reliance (Br. 9) on legislation and legislative proposals in the 85th Congress dealing with embezzlement and misuse of union welfare funds is beside the point. For petitioner was not convicted because he embezzled or misappropriated union welfare funds, but because he prevented a valid welfare fund from coming into existence. When petitioner accepted the checks from the employers, he then and there took for his own use funds which were intended by the employers for union welfare purposes. Acceptance of the money in such circumstances violated Section 302.

II. THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION

In Point I, we have shown that receipt of money or anything of value by an employees' representative, ostensibly for a union welfare fund, but in fact intended by him to be used for his personal purposes, violates Section 302. In this point, we shall show that the evidence justified the jury in concluding that, when petitioner accepted the $15,000 from the employers, he did so with the intent of using the money himself, and therefore did not accept it for the purpose of creating a bona fide union welfare fund.

As set forth in the Statement (*supra*, pp. 9–10), the jury was charged that to convict it had to find that petitioner had a different purpose in accepting the $15,000 than the employers' purpose, in turning it over to him, of creating a proper union welfare fund. Since there was no question that the employers' pur-

pose was to establish the welfare fund contemplated by the collective bargaining agreement, the jury necessarily concluded that petitioner received the money with the intent of using it for his personal purposes and not for a proper welfare fund.

The evidence supports the verdict on that basis. Petitioner's conduct before, during, and after the receipt of the money was relevant to show his intent at the moment of receipt. As the Court of Appeals correctly held (R. 271), such conduct justified the jury in concluding that petitioner merely pretended to receive the checks for a proper welfare fund and that, at the moment of receipt, he took the checks not for the fund but for himself.

Petitioner's official position as president of the union enabled him to obtain the checks by purporting to accept them for the employees' welfare fund. Before the employers delivered these checks to petitioner, they and he, as representative of the employees, had reached a collective bargaining agreement providing for the $15,000 employer contribution to a welfare fund. It had been agreed that petitioner was to represent the union in expending the fund and that Mr. Goyco, a person well-known to petitioner as a negotiator for the companies, was to represent the employers. The previous contract between the employers and the union, which was expiring at the time, had also provided for the establishment of a welfare fund, in the same amount, and that fund had been disbursed under joint control. In fact, the joint bank account which had served as a repository of the previous welfare fund pending disbursement was still

in existence; it was intended to be the repository of the new fund; and petitioner had served as the union's representative in spending the previous fund. It was therefore not strange that the employers would deliver the checks to petitioner when he explained that he wanted to show them to the union members, even though the deposits for the previous year's fund had been made directly by the employers.

The jury was warranted in concluding that petitioner never accepted the money for the purpose for which the employers gave it. Although petitioner obtained control of the checks by telling the employers that he wanted to show them to the union membership at a meeting to be held the evening of the day on which the contract was signed, the jury could well believe that petitioner made this claim for the purpose of obtaining sole physical possession of the checks so that he could deposit them in an account which he alone would control. In fact, there was no evidence that such a meeting was held.

Petitioner's intent at the time of receipt is further illuminated by his subsequent conduct. He did not deposit the checks to the welfare fund account which was in existence, and then misuse the money; he immediately opened an account which, while in the name of the welfare fund, was one over which he had complete personal control. He assured his personal control—free from interference, not only by the employers, but by his own union—by using a spurious union resolution. He tightened his control by expelling the Secretary from the union (see *supra*, fn. 2, p. 8) and demanding the right to expend union funds

on his own signature. He carried his initial intent to its logical conclusion by expending the welfare money for his own personal use. Finally, when the employers discovered his failure to carry out the agreement for joint control of the fund, he closed out the account and transferred the remaining money to another bank, over which account he again had sole control and which he continued to use for personal purposes.

The jury was entitled to infer from this evidence of petitioner's whole course of conduct, from the signing of the contract onward, that he never intended to treat these checks and their proceeds as a welfare trust fund—the only purpose for which they were given. From the moment he schemed to obtain sole possession of the checks until the time when the residue of the money was commingled with general union funds so as to be unrecognizable, petitioner did nothing with the checks and their proceeds which did not better enable him personally to dispense them for his own purposes.

The evidence of what petitioner did with the money after he got control of the checks by a trick and deposited them in an account over which he had sole control was properly admitted as bearing on his intent at the time he took them. Except where a defendant makes admissions, intent must necessarily be proved by circumstantial evidence. Petitioner's subsequent use of the money for personal expenditures indicated that his whole course of conduct was not inadvertent—that, for example, the deposit of the checks in an account other than the old welfare fund account was not

merely a matter of convenience, but part of a consistent scheme. As the Court of Appeals stated (R. 271): "The competency of the evidence of his withdrawals from the fund for his personal expenses to show his complete and sole control over the fund is too obvious to call for demonstration or the citation of authorities".

Whether complete control was petitioner's purpose at the moment he gained possession of the checks was an issue the jury was called upon to decide. The evidence concerning his disbursements was therefore properly admitted on the issue of the intent with which petitioner received the money. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Wood* v. *United States*, 41 U.S. 342, 360; *Herman* v. *United States*, 220 F. 2d 219, 224 (C.A. 4), affirmed, 227 F. 2d 332, certiorari denied, 350 U.S. 971; *Green* v. *United States*, 188 F. 2d 48 (C.A.D.C.), certiorari denied, 341 U.S. 955; *Todorow* v. *United States*, 173 F. 2d 439, 447, certiorari denied, 337 U.S. 925; *King* v. *United States*, 144 F. 2d 729, 732–733 (C.A. 8), certiorari denied, 324 U.S. 854; see Underhill, *Criminal Evidence* (5th ed.), § 788, p. 1800:

> Where the alleged fraudulent transaction is at all complicated, it is competent to prove, not only the facts constituting the transaction itself, but also all facts and circumstances involved in the steps preliminary thereto, and all facts which tend to show the course of dealing between the parties before and after the date of the offense laid in the indictment. Wide latitude is allowed. All available information should be received and no circumstance should

be excluded which would throw, or tend to throw, any light upon the intent of the parties, or upon the falsity of the representations.[9]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY 1959.

[9] Petitioner argues (Br. 16–17) that there was a fatal variance between the allegation in the indictment (as particularized) that he received the $15,000 on February 24, 1953, and the proof that he improperly spent part of the fund during March and April of that year. This issue, however, is not covered by the single question presented in the petition for certiorari, and which the petition argued, namely, whether Section 302 covers "the area of misappropriations from union welfare funds" (Pet. 2; see Pet. 6–8).

In any event, the contention has no merit. The prosecution proved that, as alleged, petitioner received the $15,000 on February 24, 1953, in the form of two checks. The evidence of his subsequent misconduct was introduced to show his intent when he accepted the checks.

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